88-2001

Supreme Court, U.S.
FILED
MAY 30 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

RANDALL SILVER and MIKALA SILVER, individually and as parents and next of kin of MICHAEL R. SILVER, Deceased, minor child,

Petitioners,

vs.

FARMERS AND MERCHANTS INSURANCE COMPANY,

Respondent.*

PETITION FOR WRIT OF CERTIORARI

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AND

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QUESTION PRESENTED

1. Whether it is a violation of the Petitioners' Due Process rights, under the Fifth and Fourteenth Amendments of the Constitution of the United States, for the Oklahoma Supreme Court to arbitrarily fail to follow the rules of civil procedure by narrowly construing the Petitioners' pleadings, and capriciously refusing to acknowledge allegations of fraud for the first time on appeal thereby dismissing the Petitioners' claim with no requisite opportunity to amend the pleading and cure the alleged defect?

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* The caption does not contain the names of all parties to the original proceeding in this case. The Court should be informed that the trial was bifurcated on the issues and a jury trial held, and judgment ultimately entered in favor of the Petitioners, against the tavern owner Ken Becknell, individually and d/b/a Cowboy Country, with a default judgment entered against the Defendant driver Christine Annette Slusher a/k/a Christine Annette Stingley and Ricky B. Henderson. The Petitioners herein are seeking a review of disposition of the issue of the uninsured motorist question which involves only the Respondent herein.

As required by Rule 28.1 of the Rules of the Supreme Court of the United States, the following is a listing of all parent companies, subsidiaries (except wholly-owned subsidiaries), and affiliates of the Respondent, Farmers and Merchants Insurance Company: The Royal Insurance Group; The Silvey Corporation; Tri-State Insurance Company; Midwestern Insurance Company and New American Life Insurance Company.

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Silver v. Farmers and Merchants Insurance Company, 60 O.B.J. 554 (Okla. February 28, 1989).

GROUNDS OF JURISDICTION

This Court has jurisdiction over this case by virtue of Title 28, U.S.C.S. § 1257, which entitles the Petitioner to seek certiorari for the review of an Opinion of the Supreme Court of the State of Oklahoma "where any title, right, privilege or immunity is specially set up or claimed under the Constitution of the United States." The Oklahoma Supreme Court, in its Opinion of May 3, 1988, as corrected on February 28, 1989, narrowly construed the factual and legal argument of the Silver family' trial brief to contain an admission which would exclude any claim of fraud or misrepresentation from the allegations of the Second Amended Petition. The Court declined to recognize the Silvers' repeated references of misrepresentation and arguments making a distinction between "intentional misrepresentation" and "negligent misrepresentation". As a result of the failure of the Court to liberally construe the allegation of the Second Amended Petition, these Petitioners

were denied their statutorily mandated remedy of amending their pleading, curing the alleged defect or of having their day in court on the well-pleaded facts of negligent misrepresentation and fraud. Therefore in violation of, and in direct conflict with, the protections guaranteed by the Due Process Clause of the Fifth and Fourteenth Amendments of the Constitution, these Petitioners were not afforded their fundamental prerogatives to equal justice, fair play and due process of law.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment of the Constitution of the United States reads, in pertinent part:

> No person shall be. . . deprived of life, liberty, or property, without due process of law. . .

Section 1 of the Fourteenth Amendment of the Constitution of the United States reads, in full:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioners herein ("the Silver family"), as Plaintiffs below, filed their original claim for relief in the District Court of Cleveland County, State of Oklahoma, for the wrongful hit-and-run death of their 12-year-old child against the drunk driver, her culpable passenger who aided in furthering the crime and a tavern owner who owned and negligently entrusted the offending vehicle to the intoxicated driver. The Second Amended Petition, which added the Respondent, an uninsured motorist insurance company (hereinafter "Farmers and Merchants"), as a Defendant, was filed on the 30th day of November, 1984, alleging fraudulent misrepresentation and a breach of a duty to properly inform the insureds of the full extent of uninsured motorist coverage ("UMC") upon the purchase of an automobile liability policy. The pleading alleges that Farmers and Merchants told the Silver family that UMC covered only property damage to the vehicle thereby misrepresenting the fact that UMC would cover the Silver family and their deceased son if bodily injury or death was caused by an uninsured motorist or motor vehicle. (Appendix E: Second Amended Petition). In that same year and each year thereafter until the collision, and in reliance upon those

negligent misrepresentations, the Silver family signed a waiver/rejection of UMC.

On December 10, 1984, Farmers and Merchants filed its Answer but failed to raise any "12(B)(6) defenses",[1] by its Answer or by any timely filed motion.

Six months after Farmers and Merchants filed its Answer, on the morning the matter was called to jury trial on June 3, 1985, Farmers and Merchants filed what was labeled a Motion to Dismiss, stating that:

> 1. There is no justifiable cause of action against this defendant and in favor of the plaintiffs under the laws of the State of Oklahoma.
>
> 2. The testimony of plaintiffs, by deposition, and the evidence of documentation in defendant's file reveals that plaintiffs have consistently rejected uninsured motorist coverage . . . and that such

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[1]OKLA. STAT. tit. 12, § 2012(B) (1988), in pertinent part, reads as follows:

> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:. . .
>
> 6. Failure to state a claim upon which relief can be granted;. . .
>
> A motion making any of these defenses shall be made before pleading if a further pleading is permitted. . .

> rejections are in the form of written, signed rejection of coverage.

(Appendix G: Farmers and Merchants' Motion to Dismiss). The next day, at jury docket call after all pretrial proceedings had been completed and the Petitioners stood ready for trial, the Trial Court overruled Farmers and Merchants's Motion to Dismiss and entered the following Court Minute:

> Question of uninsured motorist to be submitted on stipulations and/or briefs 9 a.m. 1 Jul 85. Farmers M to D O.R. (Appendix I: Court Minute)

The Silver family' pleading remained inviolate.

The Trial Court subsequently entered summary judgment in favor of Farmers and Merchants upon the reserved issue of whether the Silver family had made a knowing waiver of UMC "after full file review and consideration of the briefs, deposition testimony, and affidavits of the parties, and being fully advised in the premises. . .", as reflected in the Journal Entry of Judgment (Appendix D), filed on September 19, 1985.

The Silver family made a timely appeal to the Oklahoma Court of Appeals where the Trial Court's decision was reversed and the case was remanded to the District Court for a determination of a factual issue material to the outcome of the Silver family's claim with the following directions to the Trial

Court to use the following criteria in determining whether the insurance company made a meaningful offer of UMC:

> 1) the method of the offer must be commercially reasonable;
>
> 2) The limits of the optional coverage must be specified, not merely offered in general terms;
>
> 3) the insurer must intelligently advise the insured of the nature of the optional coverage; and,
>
> 4) insurer must advise insured that the coverage is available at a relatively modest increase in premium.

(Appendix C: Court of Appeals Opinion).

On May 3, 1988, as a result of Farmers and Merchants's Petition for Rehearing,[2] the Oklahoma Supreme Court vacated the Opinion of the Oklahoma Court of Appeals and affirmed the Trial Court's summary judgment in favor of Farmers and Merchants.

In rendering its Opinion, the Court analyzed "the insureds' single pleading" (Appendix B: Opinion of the Oklahoma Supreme Court) and narrowly construed the allegations therein rather than utilizing the liberal rules of construction required by the Oklahoma Pleading Code.

A pleading must not be dismissed for failure to state a

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[2]Filed on April 17, 1987

legally cognizable claim unless the allegations indicate beyond any doubt that the litigant can prove no set of facts which would entitle him to relief.[3] A Motion to Dismiss and a Motion for Summary Judgment take all well pleaded facts as true and make all reasonable inferences in favor of pleader or party opposing the Motion for Summary Judgment.[4]

On May 23, 1988, the Silver family filed a Petition for Rehearing through which the divided Court corrected its previous opinion but denied rehearing (Appendix B).

The Supreme Court, in its decision, said that a common law claim for bad faith, intentional misrepresentation or intentional fraud is not available to the Silvers. The Court refers to the Silver trial brief as an admission that such claims are not available in Footnote 8 of its Opinion wherein the Court sets forth the language from the trial brief and the law supporting the Court's finding of an admission. However,

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[3]Frazier v. Bryan Memorial Hospital Authority, 60 O.B.J. 1202, 1204 (Okla. May 9, 1989), citing Conley v. Gibson, 355 U.S. 41 (1957) and Atchison, Topeka & Santa Fe Ry Co. v. Buell, ___ U.S. ___, 107 S.Ct. 1410, 1417 n. 15, 94 L.Ed.2d 563 (1987).

[4]5 Wright & Miller, § 1363, p. 656; Ross v. City of Shawnee, 683 P.2d 535 (Okla. 1984); see also, Weaver v. Pryor Jeffersonian, 569 P.2d 967 (Okla. 1977).

contrary to the rules of procedure, the Court narrowly construed the words "intentional misrepresentation" and "intentional fraud" to include all forms of misrepresentation or fraud which are actionable. The Silver family made no such concession regarding negligent misrepresentation or other forms of fraud.

Instead, the Silver family affirmatively set forth in its trial brief that Farmers and Merchants was guilty of misrepresentation and fraud. (Appendix E). It is this refusal to acknowledge other forms of misrepresentation or fraud than intentional fraud or intentional misrepresentation that causes the Silver family to have their Constitutional rights of having a day in court on well-pled facts of negligent misrepresentation destroyed.

ARGUMENT

I.

THE OKLAHOMA SUPREME COURT EFFECTIVELY DENIED THE PETITIONERS THEIR CONSTITUTIONALLY PROTECTED RIGHTS OF DUE PROCESS OF LAW BY ARBITRARILY REFUSING TO ACKNOWLEDGE THE FRAUD CLAIM

A. The Oklahoma Supreme Court's Narrow Interpretation of the Pleading Is Contrary to the Rules of Construction as Set Out in the Oklahoma Pleading Code Thus Violating Petitioners' Due Process Rights

Oklahoma law does not focus on the technical aspects of pleading but, rather, on the substance of what is contained in the pleading.

> The policy of the Oklahoma Pleading Code of deciding cases on the basis of the substantive rights involved rather than technicalities requires a plaintiff to be given every opportunity to cure a formal defect in his pleading. Under subsection G of Section 2012 the court must allow the plaintiff an opportunity to amend the petition within a specified time and should not dismiss the action, unless it appears to a certainty that the plaintiff cannot state a claim.[5]

Fair notice of any claim is all that is required of the pleadings.

Under Oklahoma's Pleading Code, the Plaintiffs were not required to designate the theory of recovery relied upon but were entitled to any relief which the facts justified.[6]

This Honorable Court has itself recognized the functions of pleading as giving "fair notice of what the plaintiff's claim is and the grounds upon which it rests."[7] The allegations as pled certainly give Farmers and Merchants notice of the facts

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[5]Committee Comment on the provisions of OKLA. STAT. tit. 12, § 2012(G) (1988) (emphasis added).

[6]Doss Oil Royalty v. Texas Co., 137 P.2d 934 (Okla. 1943).

[7]Conley v. Gibson, 355 U.S. 41, 47 (1957).

upon which the claim relies even without the use of technical words. Farmers and Merchants even conducted discovery on the issue of misrepresentation. Words such as "fraudulent," "misrepresentation," "knowingly" or "recklessly made" need not be used.[8] The Silver family pled the specific facts without technical words and has been rebuffed without an opportunity to amend the pleading or to have the rules applicable to pleadings being applied with equal fairness and unarbitrarily. When the allegation of the Silver family pleading is taken as true as the Court must do under the rules applicable to a Motion to Dismiss or a Motion for Summary Judgment, it is clear that Farmers and Merchants' misrepresentations of uninsured motorist coverage misled the Silver family and induced them into an unknowing waiver of such coverage.

The Oklahoma Supreme Court has made an arbitrary and unfair application of basic procedural rules to justify an unwarranted conclusion in violation of the Silver family' Constitutional Due Process rights. Rules of procedure are designed to insure interests of a fair trial. Failure to use appropriate pleading construction rules can result in unfairness

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[8]Lone Star Gas Co. v. Oatman, 283 P.2d 810 (Okla. 1955).

and deprivation of property rights to the extent of unconstitutionality. Equal application of the law to all persons is a fundamental right. No clearer is the inconsistency of the application of procedural rules by the Oklahoma Supreme Court evidenced than by that Court's most recent decision in the case of Frazier v. Bryan Memorial Hospital Authority,[9] in which the Oklahoma Supreme Court treated the Defendant's Motion to Strike as a Motion to Dismiss. The Court there said:

> A pleading must not be dismissed for failure to state a legally cognizable claim unless the allegations indicate beyond any doubt that the litigant can prove no set of facts which would entitle him to relief.[10]

Such rules were not applied by the Court to the Silver family's pleading.

B. The Negligent Misrepresentation or Fraud Allegations in Petitioners Second Amended Petition Were Pled With Sufficient Particularity As Required By Oklahoma Law.

OKLA. STAT. tit. 12, § 2009(B) states: "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Plaintiffs stated with particularity the misrepresentation. The misrepresentation

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[9]60 O.B.J. 1202 (Okla. May 9, 1989), the Court will note that this decision was issued subsequent to the Opinion appealed in these proceedings.

[10]Id., at 1204.

was pled by alleging what the true facts should have been represented as compared to what was the actual misrepresentation made by Defendants. The language in the pleading which states particularly what the true representation should have been is:

> At the time Randall Silver purchased the insurance policies from the Defendant, Farmers and Merchants Insurance Co., the Defendant, Farmers and Merchants Insurance Co. failed to inform the Plaintiff that uninsured motorist coverage would cover Plaintiffs and their deceased son if damage occurred by an uninsured motorist or motor vehicle. (Appendix E).

This allegation contains both facts covering violation of a duty to inform as well as the factual predicate for the misrepresentation.

The Second Amended Complaint then further states with particularity what Farmers and Merchants had misrepresented to the Silver family:

> Rather, said Defendant improperly informed Plaintiff, Randall Silver, that uninsured motorist insurance would only cover property damage if Plaintiffs or their family members were involved in a collision with an uninsured motorist. (Appendix E).

Clearly, Plaintiffs factually pled a fraudulent misrepresentation as defined by OKLA. STAT. tit. 15, § 58:

> Actual fraud . . . consists in any of the following acts, committed by a party to the contract, . . . with intent to deceive another party thereto, **or** to induce

him to enter into the contract:

1. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true.

2. The positive assertion in a manner not warranted by the information the person making it, of that which is not true, though he believe it to be true.

3. The suppression of that which is true, by one having knowledge or belief of the fact.

. . .

5. Any other acted fitted to deceive. (Emphasis added).

Clearly, it was pled that Farmers and Merchants induced the Silvers to enter into a contract of waiver:

Such failure to properly and fully inform Plaintiffs as to the available coverage induced Plaintiff, Randall Silver, to sign a rejection of such uninsured motorist coverage. (Appendix E)

The misrepresentation by Farmers and Merchants come under either paragraph 1, 2, 3 or 5 of OKLA. STAT. tit. 15, § 58.

Deceit is defined at OKLA. STAT. tit. 76, § 3 as either:

1. The suggestion, as a fact, of that which is not true by one who does not believe it to be true.

2. The assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true.

3. The suppression of a fact by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of

communication of that fact; . . .

The misrepresentation by Farmers and Merchants come under either paragraph 1, 2 or 3 above.

Further, as the Oklahoma Supreme Court noted in its Footnote 8 of its Opinion, the elements of a common law action for fraud are: (1) A material misrepresentation, (2) knowingly or recklessly made, (3) with intent that it be relied upon, and (4) the party relying on the false statement suffers damages.[11] (Emphasis ours).

"With intent that it be relied upon" can be safely found within the inducement language to sign a written rejection and the language the party relying on the false statement suffers damage can certainly be found in the language:

> Due to the failure of Defendant, Farmers and Merchants Insurance Co. to properly, fully and adequately inform Randall Silver of the uninsured motorist coverage, Randall Silver lacked the requisite informed consent to sign a rejection of such coverage. Due to the failure of the Defendant, Farmers and Merchants Insurance Co. to adequately and properly inform Randall Silver of the uninsured motorist coverage and the damages sustained by Plaintiffs and their decedent, and because of such insurance policies of the Defendant, and of the facts in this case, Plaintiffs are entitled to judgment

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[11] Bras v. First Bank and Trust Co., 735 P.2d 329, 333 (Okla. 1987); D & H Co. Inc. v. Schultz, 579 P.2d 821, 824 (Okla. 1978). (Emphasis ours).

against Farmers and Merchants Insurance Co. for all damages in the sum of $9,505,613.71. (Appendix E).

Farmers and Merchants' misrepresentations are pleaded as common law fraud as well, yet the Oklahoma Supreme Court found admitted in the Silver family's trial brief that fraud was not a basis for the family's claim.

The Oklahoma Legislature has broken down "actual fraud" into two distinct categories. The first category requires that fraudulent act be committed "with intent to deceive another party thereto." The second category, which has often been referred to as "negligent misrepresentation," requires that the fraudulent act be committed "with intent to induce him [another party] to enter into the contract."[12]

The distinction must be made that a party can intend to induce another party to enter into a contract, by making false representations that the fraudfeasor believes to be true, without actually intending to deceive the other party.

The "intent to deceive" category of actual fraud has been stated by the Oklahoma Supreme Court in terms of whether the Defendant knew when he made the false representation that it

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[12]OKLA. STAT. tit. 15, § 58 (1988); OKLA. STAT. tit. 76, § 3 (1988).

was false. Whereas, the Court has analyzed the "intent to induce" category in terms of whether the Defendant was negligent in making statements without a reasonable ground for believing them to be true,[13] or where a party is induced by such statements, even though the party making the representations actually believes the statements to be true.[14] The gist of fraudulent misrepresentation is producing of a false impression, and the means of accomplishing it are immaterial.[15] Therefore, if a false impression in another's mind is made, the means by which the production of that impression was accomplished becomes immaterial, because the gist of fraudulent

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[13] P.E.A.C.E. Corp. v. Oklahoma National Natural Gas Co., 568 P.2d 1273 (Okla. 1977), (holding, essential element of actionable false representation is scienter or knowledge of falsity of statements made, **or** negligence in making statements without reasonable grounds for believing them to be true).

[14] Madden v. Graham, 174 P. 259 (Okla. 1918) (holding, one is responsible for the truth of what is affirmed by him to be an existing fact or with a view to induce another to part with his property, if his statement is relied on and accepted as true, whether he knew it to be false or not.); Kelly v. Robertson, 160 P. 46 (Okla. 1916) (holding, a party is guilty of deceit under OKLA. STAT. tit. 15, §§ 58 and 60; OKLA. STAT. tit. 76, §§ 2 and 3, where he induces another to enter into a contract by a positive material assertion which is false, though the party making it believed it to be true).

[15] State ex rel. Oklahoma Bar Association v. O'Brien, 385 P.2d 876, appeal dismissed, cert. denied 84 S.Ct. 983, 376 U.S. 649, 11 L.Ed.2d 980 (Okla. 1963).

misrepresentation is production of a false impression in another's mind.[16] Moreover, it is not essential to liability that the person charged with fraud should have received any benefit therefrom.[17]

Under the facts of the present case, even though the acts of the agent may not have been intended to deceive (which the Silver family still concede as they did in their trial brief), it is obvious that the false representations were made with intent to induce the Plaintiffs to enter into the contract of waiver of UM benefits (as was also explained in their trial brief).

Constructive fraud is defined at OKLA. STAT. tit. 15, § 59 as:

> 1. In any breach of duty which, without an actually fraudulent intent, gains an advantage to the person in fault, or anyone claiming under him, by misleading another to his prejudice, or to the prejudice of anyone claiming under him; or,
>
> 2. Any such act or omission as the law specially declares to be fraudulent, without respect to actual fraud.

Constructive fraud does not necessarily involve any moral guilt, intent to deceive, or actual dishonesty of purpose; even

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[16] Clovis v. Clovis, 460 P.2d 878 (Okla. 1969).

[17] State ex rel. Oklahoma Bar Association v. O'Brien, supra.

an innocent misrepresentation may constitute "constructive fraud" where there is an underlying right to be correctly informed of the facts. This is especially true in light of the public policy considerations underlying UMC.

Uninsured motorist coverage is mandatorily required to be included in every policy of automobile insurance issued in this state unless there exists a written rejection.[18] There is, therefore, a significant public policy favoring uninsured motorist coverage being included either by contract, legislatively, or by judicial adjudication.[19] In fact, the public policy favoring uninsured motorist coverage is so strong that in Brown, supra, the Oklahoma Supreme Court stated, "It is settled in Oklahoma that insurance policy provisions and definitions which purport to condition, limit or dilute the provisions of the uninsured motorist statutes are void and unenforceable." The Court in Chambers, supra, stated:

> The fact that the Oklahoma statute requires that uninsured motorist coverage be offered to every person buying automobile liability insurance and that a written refusal is required to substantiate rejection of such coverage indicate a very clear legislative

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[18]See, OKLA. STAT. tit. 36, § 3636 (1988).

[19]Brown v. USAA, 684 P.2d 1195 (Okla. 1984); Chambers v. Walker, 653 P.2d 931 (Okla. 1982).

> intent in favor of coverage. At 935. (Emphasis ours.)

Insurance contracts are take it or leave it adhesion contracts written in language difficult to understand. Many times insurance companies leave policy provisions in the policy which have been specifically prohibited by our Oklahoma Supreme Court. Thus making it difficult for the lay person to have even a vague understanding of what the policy of insurance really means. People rely upon insurance sales force to tell them what insurance they need and what the policy provisions provide. Insurance agents interpret coverage questions on a daily basis in determining what insurance is needed. Agents are certainly more expert in that regard than the average lay person.[20] The Oklahoma Court of Appeals has held that an individual can rely upon an insurance agent's erroneous representations and the insurer is bound by such representations even if they are contrary to the terms of the written contract.[21] Further, in the syllabus by the Court in

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[20] Allstate v. Pietrosh, 454 P.2d 106 (Nev. 1969).

[21] Warner v. Continental Casualty Co., 534 P.2d 695 (Okla. App. 1975).

Commercial Casualty Insurance Co. v. Varner,[22] the Oklahoma Supreme Court said "An insured's failure to promptly examine an accident policy and discover a departure therein from the real agreement before the loss, was held not to defeat reformation." The Tenth Circuit Court of Appeals, interpreting Oklahoma law, has said, "Under Oklahoma law, an insured has no duty to read his policy and notice discrepancies between it and previous representations of a soliciting agent."[23]

To hold otherwise is to deny the reliance Oklahoma consumers have upon insurance agents. Insurance is expensive enough as it is without requiring a purchaser of insurance to consult with an attorney every time he has a question concerning policy coverage before entering into a contract of insurance. Here, however, the language used by Farmers and Merchants was testified to as being incomprehensible, compounded by misrepresentations of the coverage by one upon whom the Silver family justifiably relied. One cannot make a false statement and then be heard to say that the one to whom it was made should not have relied upon it, but should have

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[22]16 P.2d 118 (Okla. 1932).

[23]Business Interiors Inc. v. The Aetna Casualty and Surety Co., 751 F.2d 361, 364 (10th Cir. 1984).

investigated for himself especially where it may be assumed that the truth of the representations should be within the knowledge of the person making such representation.[24] One cannot take advantage of the fact that another has too confidently relied on the truthfulness of his statements.[25] Even if there is not an underlying right by virtue of a special relationship vis-a-vis the parties, to be affirmatively informed of the facts, if one volunteers to speak and to convey information which may influence the conduct of the other party, he is bound to discover and to tell the whole truth.[26]

It is respectfully submitted that everyone, even an insurance company, who has no special relationship with an

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[24] Mulkey v. Morris, 313 P.2d 494 (Okla. 1957); Harrell v. Nash, 133 P.2d 748 (Okla. 1943); T.M. Dover Mercantile Co. v. Gates, 277 P. 231 (Okla. 1929); Thompson v. Davis, 254 P. 501 (Okla. 1927); Mangold & Glandt Bank v. Utterback, 174 P. 542 (Okla. 1918).

[25] Martinson v. Hamil, 269 P. 255 (Okla. 1928); Stevens v. Reilly, 156 P. 157 (Okla. 1916).

[26] Gidney v. Chapple, 110 P. 1099 (Okla. 1910), (holding, "although a party may keep absolute silence and violate no rule of law or equity, yet, if he volunteers to speak and to convey information which may influence the conduct of the other party, he is bound to discover the whole truth. A partial statement, then, becomes a fraudulent concealment and even amounts to false and fraudulent misrepresentation."); see also, Deardorf v. Rosenbusch, 206 P.2d 996 (Okla. 1949); Berry v. Stevens, 31 P.2d 950 (Okla. 1934).

insured of several years, has a duty to not injure or harm another person, such harm coming in the form of a negligent misrepresentation. This is a general duty recognized in Oklahoma.[27]

It is evident that the misrepresentations by Farmers and Merchants above referred are material misrepresentations. It is evident that Farmers and Merchants either knew of its falsity or the above representations were recklessly made for Farmers and Merchants is in the business of insurance. The allegations as pled certainly give Farmers and Merchants notice of these facts. As suggested above, Farmers and Merchants conducted discovery of and about the misrepresentation.

It is clear that the misrepresentations of uninsured motorist coverage by Farmers and Merchants misled the Silver family inducing the waiver to their detriment. The Silver family cannot be bound by the written rejection due to this false representation or fraud.[28]

C. Intentional Misrepresentation vs. Negligent Misrepresentation.

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[27]OKLA. CONST. art. II, § 6; OKLA. STAT. tit. 76, § 1; and OKLA. STAT. tit. 23, § 3.

[28]All American Bus Lines Inc. v. Schuster, 189 P.2d 412 (1948).

Plaintiffs stated in their trial brief there is no "intentional misrepresentation". (Appendix H). The Oklahoma Supreme Court accepted the statement as an admission. However, Plaintiffs were making the distinction between an intentional misrepresentation and a negligent misrepresentation. (Appendix H). As actual fraud is defined, it may be "the positive assertion in a manner not warranted by the information of the person making it, or of that which is not true, though he believe it to be true." Also, it can be a material misrepresentation made recklessly. Either of those two definitions of fraud fit hand in glove with the pleadings and evidence in this case. Plaintiffs were merely not wishing to over-reach their grounds of fraud.

A significant portion of Appellants' Brief-in-Chief and Reply Brief filed in the Oklahoma Supreme Court argue the distinction between an affirmative, active fraud and a passive, negligent fraud. The Silver family's theory of recovery has always and steadfastly encompassed assertions of fraud or misrepresentation. The Oklahoma Supreme Court declined to recognize Plaintiffs' allegations or the discovery process as supporting a cause of action for negligent misrepresentation but rather narrowly construed the Silver family's Second Amended

Petition in view of the trial briefs.

By the Oklahoma Supreme Court's ruling, the lawyers of Oklahoma will be required to overplead negligent fraud as an active, intentional act, devious in form and nefarious in nature subjecting themselves to a OKLA. STAT. tit. 12, § 2011 sanction for fear that the Oklahoma Supreme Court will react as it did to the pleadings herein. It becomes apparent that gentile pleading practice is not acceptable by that Court. One must plead some evil, egregious mentality on the part of a Defendant when such evil mentality is not necessary under the definitions of fraud or negligent misrepresentation. The Oklahoma Supreme Court's opinion herein requires that there be nothing short of nuclear warfare insuring that both parties will be required to try their case because of the allegations of evil wrongdoing. It is respectfully suggested that these allegations need not be made in their technical sense but must be made factually. What Plaintiffs actually pled were facts of the misrepresentation and now they are being arbitrarily punished for doing what the Court admonishes they must do.

D.Summary Judgment Does Not Test the Sufficiency of the Pleading As The Oklahoma Supreme Court Did.

A Motion for Summary Judgment attacks the sufficiency

of the evidence as opposed to the sufficiency of the pleading:

> . . . on the ground that the depositions, admissions in the pleadings, stipulations, answers to interrogatories and to request for admissions, affidavits, and exhibits on file, . . . show that there is no substantial controversy as to any material fact. Rule 13, Rules for the District Courts of Oklahoma.

Nowhere does Rule 13 speak to the sufficiency of the pleadings.

In fact, the Oklahoma Supreme Court has held a party may not rely on his pleadings to controvert a Motion for Summary Judgment.[29] A summary judgment motion is analyzed in relationship to extraneous materials other than the bald allegations of the pleadings unless there are admissions of fact or law within the pleadings. There are no such admissions in the Second Amended Petition of the Plaintiffs herein. The Court of Appeals in Oklahoma has said, "Clearly, Rule 13, supra, was not intended to be used as a means of testing the pleadings."[30]

Therefore, it is clear summary judgment motions do not address the allegations of the pleadings but seek to test the

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[29] Weeks v. Wedgewood Village, 554 P.2d 780 (Okla. 1976).

[30] Metcalf State Bank v. Gaither, 577 P.2d 468 (Okla. Ct. App. 1977). (Emphasis ours); See also, Beck v. Bacone College, 604 P.2d 876 (Okla. Ct. App. 1980).

evidentiary facts which would support the pleadings.

E. Farmers and Merchants Waived a Defense of Failure to State a Claim.

A defense of ". . . failure to state a claim upon which relief can be granted . . . is waived:

> A. If omitted from a motion that raises any of the defenses or objections which this section permits to be raised by motion, or
>
> B. If it is not made by motion and it is not included in a responsive pleading.[31]

Defendant, Farmers & Merchants, did not file a motion to dismiss within twenty days of the Second Amended Petition or any extension thereof as required by OKLA. STAT. tit. 12, § 2012. The Petition which added Farmers and Merchants as a Defendant was filed on the 30th day of November, 1984. Defendants filed an Answer on the 10th day of December, 1984. This Answer did not claim a defense of failure to state a claim upon relief can be granted. (Appendix F). Therefore, such a defense was waived by Defendant Farmers & Merchants.

Defendant, Farmers and Merchants, had not raised a defense of failure to state a claim by pretrial.

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[31]OKLA. STAT. tit. 12, § 2012 (1988).

It was not until this matter between the Silver family and Farmers and Merchants was called to trial on June 3, 1985, that Defendant filed what was labeled a motion to dismiss. The Court overruled the motion to dismiss the next day at jury docket call.

Had the Trial Court sustained a timely filed Motion to Dismiss on the grounds that there was a failure to state a claim, the Trial Court would have been required to grant leave to the Plaintiffs to amend if the defect can be remedied. OKLA. STAT. tit. 12, § 2012(G) states: "On granting a motion to dismiss a claim for relief, the court shall grant leave to amend if the defect can be remedied and shall specify the time within which an amended pleading shall be filed. . . ." However, the Trial Court entered a summary judgment based on evidence and not a dismissal on the pleading. The suggested defect on appeal can be obviously remedied under the facts of this case by remanding to the Trial Court with instructions to permit an amendment. This is precisely the procedure followed in the case of Beck v. Bacone College, supra, where the Trial Court purportedly ruled on a Motion for Summary Judgment without reviewing matters outside the pleadings. Where the Trial Court in effect ruled on a motion to dismiss but had

entered a judgment, the Court of Appeals reversed the judgment, remanded the case to the District Court to give the plaintiff time to amend. Therefore, the Oklahoma Supreme Court should have either remanded the matter to the Trial Court permitting Plaintiffs to amend in conformance with the opinion of that Court or used the rules applicable to all litigants (excepting, evidently, the Silver family).

F. Due Process Abridgement

When the Oklahoma Supreme Court did not recognize the fraud allegation as viable or remand with instructions to grant leave to Plaintiffs to amend the pleadings, the Silver family was effectively denied their day in Court and an opportunity to be heard on technical pleading issues not timely raised before the Trial Court and appropriately deemed waived under our Pleading Code. Farmers and Merchants is given the benefit of having waived a defense and now having that defense restored without an opportunity given to the Silver family to either object or cure the technical deficiency found by the Oklahoma Supreme Court. A fundamental requisite of due process is the opportunity to be heard, and such hearing must be meaningful

and appropriate to the nature of the case.[32] "It has long been recognized that equal access to the Courts, and modes of procedure therein, constitute basic and fundamental rights. The Courts must be open to all on the same terms without prejudice. . . . Access to the Courts and those procedures utilized therein are clearly fundamental rights."[33]

Had the Trial Court sustained the Motion to Dismiss based on the pleadings, Plaintiffs would then have been given an opportunity to amend their pleadings and been given notice of what failings the Oklahoma Supreme Court deemed fatal.[34] Where a particular method of procedure is provided, it must be followed.[35] Instead, the Trial Court overruled the Motion to Dismiss from which Plaintiffs were never given notice that their fraud factual allegations were insufficient. "Due process requires adequate notice and a realistic opportunity to appear at a hearing in a meaningful time and in a meaningful manner.

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[32]Matter of W.D., 709 P.2d 1037 (Okla. 1985); York v. Halley, 534 P.2d 363 (Okla. 1975); U.S. CONST. amend. V; U.S. CONST. amend. XIV.

[33]Thayer v. Phillips Petroleum Co., 613 P.2d 1041 (Okla. 1980).

[34]OKLA. STAT. tit. 12, § 2012(G) (1988).

[35]Wolfenbarger v. Hennessee, 520 P.2d 809 (Okla. 1974).

The right to be heard is of little value unless adequate notice is given . . ."[36] The policy of the Oklahoma Pleading Code of deciding cases on the basis of the substantive rights involved rather than technicalities requires a Plaintiff to be given every opportunity to cure a formal defect in his pleading.[37] Therefore, there is a denial of due process by the impact of the Oklahoma Supreme Court's ruling.

CONCLUSION

Rules of procedure are designed to insure interests of a fair trial. Failure to use appropriate pleading construction rules have resulted in unfairness and deprivation of property rights to the extent of unconstitutionality. Equal application of the law to all persons is a fundamental right.

By: _____

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AND

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[36] First National Bank v. Oklahoma Savings and Loan Board, 569 P.2d 993 (Okla. 1977).

[37] See, Committee Comment to OKLA. STAT. tit. 12, § 2012 (1988).

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ATTORNEYS FOR PETITIONERS

** Counsel of Record

Respectfully submitted this 26th day of May, 1989.

PROOF OF SERVICE

I, Rex K. Travis, Counsel of Record for Randall and Mikala Silver, Petitioners, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the _____ day of May, 1989, I served a copy of the foregoing Petition for Writ of Certiorari to the Supreme Court of the United States on Farmers and Merchants Insurance Company, the Respondent herein, by delivering a copy thereof to Jim W. Lee, Esq., attorney of record for the Respondent, at his office located at 2728 N.W. 39th Street, P. O. Box 1907, Oklahoma City, Oklahoma, 73157-7320.

REX K. TRAVIS